Copyright in the networked world
E-mail attachments

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Abstract

Many practices that are legal or at least clearly "fair use" in the paper world encounter serious complications in digital form. This is partly because the statutes and case law mostly do not refer to electronic situations, and analogies which one person finds reasonable may seem absurd and unacceptable to another. This column looks at two specific uses of e-mail attachments and the issues surrounding them. The use in some sense is the same, but the circumstances can lead to different conclusions.

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Introduction

Legal reasoning depends often on analogy. In the case of copyright law, it is tempting to make an analogy between what is legal in the paper world and what we might like to be legal in our digital practices. It sounds logical. Unfortunately it can lead to trouble.

This column looks at two specific examples of copying which are clearly acceptable when done in paper, but questionable when done digitally. The first comes from a classroom teaching environment, but is also relevant to bibliographic instruction. The second is a problem encountered increasingly while doing reference in distance education settings. These are real cases, but I have changed a few details to protect the interests and identities of the people who brought them to me.

Context

Before looking at the cases themselves, it is important to understand something about the context. Both examples depend to some degree on interpretations of the "fair use" clause in the US Code (17 USC 107). Australian, Canadian, and UK concepts of "fair dealing" are similar enough that much of the discussion is broadly relevant. The common law legal traditions are also sufficiently similar that rulings in one country can have consequences in another – the recent Bridgeman decision is an example (*Bridgeman Art Gallery Ltd* v. *Corel Corp*). The US statute lists four key tests for whether a use is fair:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use on the potential market for or value of the copyrighted work.

Those unfamiliar with fair use may want to consult Kenneth Crews' book, *©opyright, Fair Use, and the Challenge for Universities* (Crews,

1993), or the CETUS (Consortium for Educational Technology for University Systems) article, " Fair Use of Copyrighted Works" (CETUS, 1995). In general, nonprofit copying of scholarly or factual materials is considered fair as long as only small amounts are involved that do not undermine the market for the work as a whole. It is important to remember that recent court decisions, such as the Michigan Documents case (*Princeton University Press* v. *Michigan Document Services*), have given particular weight to the final point about market value.

Efforts have been made to understand fair use in a digital setting. In 1997 the Conference on Fair Use (CONFU) attempted to establish broad agreement on a variety of key issues, including:

- digital images;
- distance learning;
- educational multimedia;
- electronic reserve systems;
- interlibrary loan/document delivery; and
- fair use of computer software.

Such guidelines would have gone far to set precedents for the allowable extent (or limit) of digital copying. Unfortunately CONFU suffered from many dissenters, though some working groups made modest progress (Lehman, 1997). In deciding situations like those in the examples below, we are left very much to our own weak human powers of judgment and reason.

Example one: class use

Faculty member X at a medium-sized state university had been teaching a management course in the business school for years. He was a devoted reader of the *Wall Street Journal (WSJ)*, and often clipped *WSJ* articles for class use. Sometimes he would just put them on a bulletin board or pass them around. Other times he would make photocopies. Classroom use guidelines permitted this ("Agreement on Guidelines for Classroom Copying…", 1976), as long as he:

(1) Met the test for brevity, which he almost always did since these were short single articles.
(2) Met the test for spontaneity, which he generally did because he wanted articles on current topics and clipping them was his own idea.
(3) Made only enough copies for his class, which he did within a copy or two.

In the paper world, he was fundamentally copyright compliant.

Then he subscribed to the online interactive edition of the *WSJ*, which he liked enormously because it let him specify which articles he wanted to see. It also became very easy for him to cut and paste the digital articles. He could print them and distribute them in paper as before, but since he had already set up an e-mail list for communicating with his class, it was easier to attach the digital articles to an e-mail message and send it to his class. The advantages were considerable. It saved paper, which he liked since he was ecologically conscious. It saved time, which he was always short of. And it reached every student quickly enough that the more diligent could read the article before class, and perhaps be ready to discuss it.

He felt that this practice lay well within both fair use and classroom guideline use. Nothing had changed from how he had behaved with paper copies, except that the article now went to students in digital form. He had not even digitized it – the *WSJ* had done that. He had simply taken a copy to which he had rightful access and passed it out. He was also aware that the *WSJ* had a generous policy for allowing its articles to be used in the classroom. Rather than undermining sales of *WSJ* subscriptions, he felt he was actively promoting both the newspaper and its interactive edition.

The arguments against Professor X's interpretation mainly have to do with the different nature of a digital document. Each copy of a digital work is a full and perfect reproduction which is itself easily reproduced further without any loss of quality and at essentially no cost. In other words, with a digital copy the usual barriers to further dissemination do not apply. A photocopy of a photocopy rarely looks as good as the original, and even the modest $0.05 or $0.10 cost dissuades most people from making more copies than they need. In terms of the US statute on fair use, the problem is that distributing a digital copy of an article does in fact

undermine sales – all the more so because the *WSJ* sells access to back issues as part of the package for its interactive edition, and also sells full text copies of articles to information services like Lexis-Nexis.

Professor X disagrees. He argues that his e-mail distribution list has a clear limit (i.e. only students enrolled in his class), and if the students send the article to others, then the violation is theirs, not his. To reinforce that, he added a copyright warning based on the text used at photocopy machines.

The problem is that from a publisher's viewpoint these are not sufficient barriers to further copying. Students might well unthinkingly put the article on a Web page or send it to an e-mail list because it supported a point which they wanted to make. The more students who receive this article, the more likely it is that one of them will make additional illegal copies of that sort. Although the fault for the further distribution would be theirs, they could not have done it without the initial access to the digital work that Professor X gave when he distributed the copies.

Risk analysis is also an important part of any practical copyright example. In this case professor X argues that the likelihood of the *WSJ* learning of the copying is fairly small, and that they are likely at worst to tell him to stop. But the risk of the *WSJ* or any other publisher learning about such copying depends on factors not under his control, such as how the students behave with the copies they received. If only one of them distributes it carelessly, the likelihood of discovery increases fast. The likelihood of a copyright owner suing for damages depends a lot on how tempting a target Professor X's university is. Since university budgets are relatively large and most administrators reasonably shy about allowing their institutions to be dragged into lawsuits, strong institutional pressures are urging Professor X to stop.

Example two: reference use

A reference librarian Y at (let us say) the same state university was accustomed to making photocopies of citations or other complex information for readers who phoned in with reference questions. Her idea was that it would take too long to write the information down, and the danger of getting some detail wrong was too great. The photocopy was cheap and reliable, and would reach the reader in a day or so via campus mail – occasionally she might even fax the sheets. This copying was permitted under Section 108 of the US copyright act (17 USC 108), since:

- there was no commercial advantage to the library;
- the collections were open to the public;
- she stamped a copyright warning notice on the first page (or more recently included a photocopy of copyright notice page from the work itself);
- the copies became the property of the person who called with the reference question; and
- she believed the person intended to use the copies for scholarly research (Hoon, 1997, p. 8).

Librarian Y realized that the fax copy might be a technical violation of the law, since it meant that she had made a second copy via fax, but since she immediately recycled her first copy, her conscience was clear.

Increasingly she began to use online, full-text databases. They were more up-to-date, they were faster to search, and they did not require leaving the desk. She could also print out pages from them and send them through campus mail as before. A printout seemed no different to her than a photocopy in terms of copyright procedures. She stamped the same warning on the first page, and handled them as before.

One of her favorite database sets was FirstSearch from OCLC; as soon as she discovered the option to send citations and full-text articles by e-mail, she made sure that she knew the e-mail address of the person she was helping and sent information that way. She had no copyright qualms about this, because it used a facility which the database itself provided. She also noticed that the e-mail with a full-text article contained the following warning:

> Copyright: The magazine publisher is the copyright holder of this article and it is reproduced with permission. Further reproduction of this article in violation of the copyright is prohibited.

FirstSearch was only one of several databases that the library offered, and not every database had an e-mail option. Lexis-Nexis Universe, for example, did not have an e-mail option, and did

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have very specific language on its "terms and conditions" page that allowed printouts "via printing commands of the Online Services and to create a single printout." It also allowed "the right to retrieve via downloading commands of the Online Services and store in machine-readable form for no more than 90 days, primarily for one person's exclusive use, a single copy of insubstantial portions of those Materials included in any individual file…"[1]. Those terms worked well if someone was sitting at the machine in the library and had a disk handy to insert, or if readers were working from their own machines at home or in the office. But did it allow her to download and e-mail the same file that she could legitimately put on her machine for 90 days or print out and send through campus mail? She decided it did. Essentially she was merely adding another step to the download process, and she carefully included the warning language from the terms and conditions Web page, though she had no real illusions that the reader would delete the file after 90 days. She, however, deleted her copy the moment the e-mail was sent.

A vendor like Lexis-Nexis might reasonably take exception to Librarian Y's interpretation, because resending the information does, in fact, violate the letter of the agreement. But the legal departments of vendors seem to recognize a certain flexibility in the execution of their terms and conditions, and may well be happy that someone had read them at all. Fair use does not play a role here, though it might well be invoked if the format were not digital.

Not all of Librarian Y's searches were on vendor-supplied databases that had well-developed print or download system and carefully phrased terms and conditions. She also found useful information on a variety of other Web sites. One example was John Labovitz's "E-Zine List"[2]. The E-Zine List home page had a copyright notice at the bottom. Under current US law, this was unnecessary, since original works are protected immediately the moment they are fixed in permanent form, even on something so impermanent as a computer disk. But the notice did serve as a reminder. The URLs for items on the E-Zine list were relatively uncomplicated, so rather than copy and paste, she simply sent the URL in an e-mail to remote readers. The URL was essentially a fact, like the title of a book or article; it was not, she felt, protected, and could be sent with impunity. Also it promoted the site, rather than undercut any possible revenue, so it seemed like fair use as well.

But increasingly large Web sites use database-generated URLs which can be almost impossibly complex to retype, and may change as the database changes. An example of this from American Memory[3] at the Library of Congress is:

http://memory.loc.gov/cgi-bin/query/r?ammem/ncr:@field(SUBJ+@band(Moccasins))

While the images and texts in American Memory, because they predate 1923, are all in the public domain under US law, the introductions and descriptions have copyright protection (since they were created by people not working for the Federal Government). Librarian Y decided that, in cases like this, she would just copy and paste the text into an e-mail message to a particular reader who had requested it, along with a copyright warning.

Thus Librarian Y ultimately reached the same point as Professor X, sending out e-mail copies of protected works. Are there differences and do the differences matter?

Two differences seem potentially important. The first is that Librarian Y is sending the digital form of the work to only one person, who has requested it and could have found (and copied) the information on his or her own for free. By asking the reference question the reader had, in a sense, requested the copy. Libraries are allowed to make a copy for a reader in paper version under the circumstances noted above, and those circumstances had not changed. The second difference is that the classroom guidelines did not apply. This was not a face-to-face teaching situation. If it had been, as in a normal in-library reference encounter, the need to send the digital copy would not have arisen. Librarian Y has to rely on the library copying provisions in Section 108 (if they even apply to Internet material, which could be doubtful), and on fair use in Section 107.

The argument in favor of fair use for this example might run as follows:

- *Purpose and character*. The institutional context was educational and scholarly, and

Librarian Y believed the end-user wanted the copy of the work for private research. This should be a plus for fair use.

- *Nature*. The works in the example were all factual and scholarly, and meant to share information or ideas. This should also be a plus for fair use.
- *Amount*. In some cases Librarian Y took the whole of an article, but more often she took only a few paragraphs of relevant text or a set of citations. Except for the whole article, this should be a plus for fair use.
- *Market effect*. The market effect is difficult to gage. For Web sites that have advertising, it could have a negative effect, because it would reduce the number of visits to the site, and thus make advertisers more reluctant to pay or to pay as much. For sites which neither charge nor have advertising, the market effect should be nil. So for sites like American Memory, this too should be a plus for fair use.

Conclusion

It would be wrong to suggest that Professor X's use of e-mail attachments was clearly wrong while Librarian Y's use of them was an acceptable fair use. There are no guidelines, no court precedents, no clear wording in the statutes that defines right and wrong in completely unambiguous terms. The arguments presented above are also far from exhaustive, and do not begin to deal with the complex licensing and contracting issues which affect copying from vendor-supplied databases or services like the *WSJ* interactive edition.

Nonetheless the arguments for a possible violation by Professor X seem stronger to me than for Librarian Y, even though, in some sense, they are doing the same thing. Professor X is taking articles from a commercial database to which he has access that the students do not, and he is distributing multiple copies to people who have not personally requested them and who are more likely than an individual reader to save, resend, or otherwise make additional copies, if only because of the larger number of people involved.

It may well be, as some argue, that our educational institutions should take a more aggressive stance and defend uses of both kinds as fair. To do that will take an institution whose leaders feel strongly enough about this issue, and are secure enough in their own positions, that they will risk or even court litigation to decide the question. These are important questions, but institutional leaders may well feel they have more important things to do. Meanwhile librarians, faculty, and readers in general will have to struggle with how best to interpret the law within the context of their own institutions and consciences.

Of course, one alternative remains. It is always possible to ask permission. It is safe and certain, and the majority of rights owners, in my experience, grant reasonable requests both quickly and for free.

Remember that the interpretations offered here are mere layman's opinions, not legal advice.

Notes

1 http://www.lexis-nexis.com/lncc/about/terms.html

2 http://www.meer.net/~johnl/e-zine-list/

3 http://memory.loc.gov/

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